

**MINUTES  
of the  
FIFTH MEETING  
of the  
CRIMINAL JUSTICE REFORM SUBCOMMITTEE  
of the  
COURTS, CORRECTIONS AND JUSTICE COMMITTEE**

**June 25, 2014  
State Capitol, Room 321  
Santa Fe**

The fifth meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee (CCJ) was called to order by Representative Antonio "Moe" Maestas, co-chair, on June 25, 2014 at 9:27 a.m. in Room 321 of the State Capitol.

**Present**

Rep. Antonio "Moe" Maestas, Co-Chair  
Sen. Lisa A. Torracco, Co-Chair  
Rep. Gail Chasey  
Rep. Zachary J. Cook  
Sen. Cisco McSorley  
Sen. Bill B. O'Neill  
Rep. Jane E. Powdrell-Culbert  
Sen. Sander Rue

**Absent**

**Guest Legislators**

Sen. Jacob R. Candelaria  
Sen. Daniel A. Ivey-Soto  
Rep. Mimi Stewart

**Staff**

Douglas Carver, Staff Attorney, Legislative Council Service (LCS)  
Caela Baker, Staff Attorney, LCS  
Monica Ewing, Staff Attorney, LCS

**Guests**

The guest list is in the meeting file.

**Handouts**

Handouts and other written testimony are in the meeting file.

**Wednesday, June 25**

**Welcome and Introductions**

Member of the CJRS introduced themselves.

**Recapitulation of Proposals Brought Before the Subcommittee to Date and Future Meeting Topics**

Representative Maestas explained that the CJRS is a subcommittee of the CCJ. He stated that the CJRS must consider proposed legislation at its November meeting so that legislation recommended for endorsement can be heard by the CCJ at its December meeting.

Representative Maestas further stated that, going forward, the CJRS plans to have thematic meetings, each of which will focus on a particular area of the criminal justice system.

**The Mechanism of Sentencing and Mandatory Minimum Sentencing in New Mexico and the Problems and Costs Entailed by Mandatory Minimum Sentencing**

Kim Chavez-Cook, assistant appellate defender and law office of the Public Defender lobbyist, provided the CJRS with an overview of the mechanics of sentencing. She explained that after a person is charged with a crime, the person is typically arraigned within 15 days. At that point, the defendant can plead guilty or not guilty; however, if the defendant intends to plead guilty, the court must ensure that the defendant understands the sentence he or she is facing. If the defendant chooses not to enter a plea, the defendant may not know what sentence he or she will face until much later in the process, when a sentencing document is created. Lesser included offenses may not be charged at the time the sentencing document is created and can be added later.

Ms. Chavez-Cook added that some sentences are subject to suspension or deferment, meaning that the defendant could get probation instead of prison time, while "mandatory minimum" sentences carry mandatory prison time. Every first degree felony carries a mandatory minimum sentence of 18 years; however, the sentencing judge can "mitigate" up to one-third of the sentence. In other words, the judge can reduce the sentence from 18 years to 12 years. Additionally, prosecutors can exercise discretion and offer the defendant a plea deal for a second degree felony, rather than a first degree felony, so that the defendant can avoid mandatory prison time.

Another sentencing variable relates to eligibility for earned meritorious deductions or "good time". Most criminal offenses are eligible for "day-for-day" good time, but some are not. Serious violent offenders are only eligible for four days per month of good time, and defendants charged with first degree murder are not eligible for any good time. Moreover, sentences served in county jail only count toward good time if the sentencing judge so orders.

Ms. Chavez-Cook indicated that in addition to first degree felonies, certain other offenses also carry a mandatory minimum sentence. For example, second degree criminal sexual penetration and second degree criminal sexual contact with a minor carry sentences of up to 15

years, three years of which cannot be suspended or deferred. Any conviction for driving while intoxicated (DWI) beyond the first conviction also carries a mandatory minimum sentence.

Another sentencing variable relates to sentencing enhancements. Sentencing enhancements must run consecutively, rather than concurrently, and cannot be suspended or deferred. The most frequently used sentencing enhancement is for habitual offenders. Ms. Chavez-Cook explained that if a defendant is charged with several felonies and has prior convictions, the habitual offender enhancement can be applied to each felony charge. A member of the CJRS asked whether sentence enhancements for habitual offenders can run concurrently. Ms. Chavez-Cook responded that such enhancements can run concurrently. Prosecutors have discretion in determining when to seek sentencing enhancements for habitual offenders. Other sentencing enhancements include increased sentences when:

- a firearm is used during the commission of a felony;
- the defendant is convicted of a third violent felony;
- the defendant is convicted of a second violent sexual offense; and
- the defendant is convicted of homicide by vehicle or great bodily harm by vehicle when the defendant is driving while intoxicated and where the defendant had a prior DWI within 10 years.

Mark Donatelli, criminal defense attorney and special prosecutor, explained that in reality, mandatory sentencing is rarely imposed because few cases ultimately go to trial and result in a first degree felony conviction. Mostly, mandatory minimum sentencing is used as a prosecutorial tool in the plea bargaining process. The concern over mandatory minimum sentencing is that prosecutors, rather than judges, have significant discretion.

Mr. Donatelli explained that before 1979, New Mexico had "indeterminate sentencing", under which a criminal defendant could engage in self-improvement programs and could be released early for good behavior. Mr. Donatelli stated that without such opportunities, inmates lose hope and motivation. He implored the CJRS to be mindful of the fact that over 90 percent of incarcerated individuals will be released back into the community and asked the CJRS to consider the effects of long sentences on those individuals. He explained that returning to indeterminate sentencing may reintroduce hope and motivation to inmates, encourage them to engage in self-improvement programs and prevent recidivism.

A member of the CJRS asked how many inmates eventually return to the community. Tony Ortiz, New Mexico Sentencing Commission, stated that 95 percent to 96 percent of inmates return to the community. The member commented that inmates should have incentives to change their behavior and that the CJRS needs to consider expanding alternative sentencing and wraparound services during incarceration and after release from prison. Several members agreed that more programming and mental health services must be offered during and after incarceration.

Several members of the CJRS questioned the propriety of removing or limiting prosecutorial discretion. One member stated that, frequently, the prosecutor has more knowledge about the case than the judge. Mr. Donatelli responded that the problem is that prosecutors and defense attorneys are advocates for their respective sides. In theory, judicial temperament is supposed to "ameliorate the retributive urge".

A member of the CJRS stated that public safety, efficiency and cost-effectiveness must be the most important concerns underlying any reforms undertaken by the subcommittee. The member also expressed an interest in amending the statutes concerning earned meritorious deductions to give discretion back to the Corrections Department (NMCD).

Members of the CJRS engaged in a discussion regarding peremptory excusal of judges and whether the New Mexico Supreme Court is planning to eliminate peremptory excusal. One member of the CJRS asked whether the legislature could enact a statute pertaining to peremptory excusal. Ms. Chavez-Cook and Mr. Donatelli indicated that such legislation may be appropriate if peremptory excusal can be characterized as a substantive right, as opposed to a procedural rule.

A member of the CJRS inquired as to how many criminal cases actually go to trial. Mr. Ortiz responded that 99 percent of cases do not go to trial. The member asked whether mandatory minimum sentencing has had any effect on recidivism. Mr. Ortiz stated that he is not aware of any such statistics. Mr. Ortiz indicated that more than two-thirds of inmates in New Mexico are incarcerated as a result of a violent crime.

Another member of the CJRS asked about the role of drug courts and inquired as to who decides if a person is eligible for drug court. Ms. Chavez-Cook indicated that the prosecutor typically decides whether to offer drug court to a defendant. A member of the CJRS disagreed and stated that — at least in the Second Judicial District — a defendant can request drug court, a screening will be done to determine if the defendant meets the criteria, and the judge ultimately makes the decision. Another member of the CJRS clarified that before drug court can be imposed, a defendant must plead guilty. A member of the CJRS stated that the subcommittee should look at making drug court available prior to entering a plea and also indicated that serious consideration should be given to implementing the sequential intercept model.

A member of the CJRS asked whether judges can send people to treatment in lieu of incarceration. Ms. Chavez-Cook responded in the affirmative and added that judges can also sentence people to treatment in lieu of probation.

Members of the CJRS engaged in a discussion about "truth-in-sentencing" laws and federal incentives to incarcerate violent offenders for longer periods of time.

A member of the CJRS stated that there is emerging consensus that evidence-based programs should be implemented in the criminal justice system and that there should be a greater

focus on community corrections. The member further indicated that "early release" should be reinstated and requested a short presentation on this topic.

Another member of the CJRS stated that drug rehabilitation programs are needed in the community, and not just for people who have already committed offenses.

A member of the CJRS inquired about the elements of the crime of negligent child abuse. Ms. Chavez-Cook responded that there are problems with this particular statute because "serious bodily harm" is ambiguous. Additionally, she noted that a recent court decision held that "negligent" child abuse includes medical neglect without any "actual knowledge" on the part of the parent.

A member of the CJRS cautioned that mandatory minimum sentences are only imposed on persons who have already been convicted of a crime. The member expressed disapproval for reducing sentences for any violent crimes but indicated that the negligent child abuse statute should be reviewed. Additionally, the member expressed disapproval of efforts to increase programs and services for serious violent offenders.

Another member of the CJRS pointed out that Section 31-18-17 NMSA 1978 gives judges some discretion to alter sentences and inquired as to whether judges are exercising this discretion. Ms. Chavez-Cook responded that judges do exercise discretion pursuant to Section 31-18-15.1 NMSA 1978, which allows judges to alter a basic sentence; however, she indicated that judges use Section 31-18-17 NMSA 1978, which permits alteration of sentences for habitual offenders, with less frequency.

### **Programs in Other States That Address the Problems and Costs Inherent to Mandatory Minimum Sentencing**

Melissa Hill, attorney and legislative chair, New Mexico Criminal Defense Lawyers Association, told the CJRS that the federal government has started to rethink mandatory minimum sentences due to disparity in enforcement and application. She indicated that partisan political elections, such as elections for judges and district attorneys, can play a role in how criminal laws are applied. Ms. Hill further stated that some district attorney offices have policies that require defendants to accept or reject plea offers before any victims have been interviewed and before either side has had an opportunity to investigate the case.

Ms. Hill posed the following questions. Are long sentences likely to have a deterrent effect? She indicated that some studies suggest that certainty of punishment is a stronger deterrent than is length of incarceration. Moreover, studies are inconclusive as to whether sentencing enhancements for gun crimes have a deterrent effect. Concerning the "three strikes" law in California, Ms. Hill indicated that the law has had a "negligible deterrent effect". She posited that the small deterrent effect may be outweighed by the significant cost of incarcerating individuals who are sentenced to a prison term of 25 years to life as a result of a "third strike".

Ms. Hill stated that the crime-reducing effect of incarceration declines as the length of sentences increase. She explained that modern theories of deterrence indicate that deterrence depends upon: 1) certainty of crime reporting, apprehension and prosecution; and 2) awareness of the consequences of criminal activity among potential offenders.

### **Legislative Proposals Regarding Mandatory Minimum Sentencing**

Ms. Hill suggested that the CJRS consider narrowing the definition of "habitual offender" to eliminate misdemeanor offenses and amend the law to permit the imposition of only one sentencing enhancement. She indicated that some states — including North Dakota, Rhode Island, South Carolina, Delaware and Ohio — have repealed some laws imposing mandatory minimum sentences, although the repealed laws pertain mainly to nonviolent drug offenses. She stated that some states have gone back to awarding higher rates of good time for time served and enacted or revised geriatric- or compassionate-release laws. Ms. Hill further explained that there is a national trend toward "softening" habitual offender time for drug crimes.

Ms. Hill suggested a change to Section 30-9-11(E) NMSA 1978, concerning the crime of criminal sexual penetration, to require a difference in age of at least four years between the alleged perpetrator and the alleged victim. She also suggested a change to Section 12-2A-16 NMSA 1978 to allow more lenient sentences to be applied retroactively when laws are amended to reduce sentences. Ms. Hill indicated support for legislation requiring a fiscal impact report any time a bill creates a new crime or increases penalties for an existing crime.

A member of the CJRS extended an invitation to Amy Orlando, general counsel, Department of Public Safety, to participate in the work of the subcommittee and stressed the importance of a bipartisan approach to criminal justice reform.

Members of the CJRS engaged in a discussion concerning geriatric release. One member stated that a problem facing the geriatric-release program is that there are no facilities in which geriatric-release inmates can be placed. Sherry Stevens, acting executive director, Parole Board, stated that many inmates who are eligible for geriatric release do not have a nursing home or a family member that is willing to accept them upon release. A member of the CJRS indicated that the New Mexico Mortgage Finance Authority should consider building a facility that could house these inmates.

A member of the CJRS asked how many geriatric offenders apply and qualify for geriatric release each year. Ms. Stevens responded that no more than four inmates apply each year and that most qualify. The member asked how the geriatric-release program could be expanded without compromising public safety. Ms. Stevens responded that she would address this issue with the members of the Parole Board. A member of the CJRS suggested that geriatric release could be expanded to include elderly inmates who do not pose a threat to the public, even if they are not necessarily ill or dying.

Members of the CJRS discussed prison medical costs and Medicaid enrollment for inmates. One member stated that pursuant to New Mexico statute, Medicaid is canceled, rather than suspended, once a person is incarcerated and that this law should be changed.

### **Sentencing in New Mexico — the District Attorney Perspective**

Angela "Spence" Pacheco, district attorney, First Judicial District, told members of the CJRS that all district attorneys are different, but no district attorney enjoys sending a person to prison, regardless of political affiliation. She stated that while a criminal defense lawyer is an advocate, a prosecutor is charged with balancing the nature of the crime and the manner in which the crime was committed with the appropriate response in order to achieve justice. She explained that justice is different in every case.

Ms. Pacheco indicated that sentencing enhancements are important tools for district attorneys. She expressed support for closing prisons and spending more money on treatment and rehabilitation programs.

Henry Valdez, director, Administrative Office of the District Attorneys, reiterated that very few crimes have mandatory minimum sentencing. He indicated that mandatory minimum sentences exist for serious violent crimes and second or subsequent drug trafficking offenses. In addition, mandatory minimum sentences exist for DWI offenses. Mr. Valdez indicated that a benefit of mandatory minimum sentencing is that it equalizes the application of sentencing.

Mr. Valdez indicated that habitual offender enhancements are perhaps the most frequently used form of mandatory minimum sentencing. He stated that in 2003, changes were made to statute to allow judges some discretion concerning the first level of habitual offender enhancements. Additionally, he pointed out that when looking at the criminal history of a habitual offender, only convictions within the previous 10 years count for the purpose of habitual offender enhancements.

Mr. Valdez expressed support for alternative sentencing and halfway house options. He also indicated that the CJRS should consider receiving input from victims or victim advocacy groups. A member of the CJRS requested that victim advocacy groups be added to a future agenda for the CJRS.

A member of the CJRS stated that policymakers and the public need to move away from the mind set of "hurt them more, make it longer" with regard to criminal defendants and, instead, focus on making the punishment more effective. Several members of the CJRS agreed with this statement.

Members of the CJRS asked for input and collaboration from the district attorneys concerning any reforms undertaken by the subcommittee.

**Public Comment**

Kathy Swope told members of the CJRS that her daughter has been struggling for many years with methamphetamine addiction. Her daughter has been in and out of the criminal justice system for many years and is entering a drug rehabilitation program for the first time in July 2014. Ms. Swope expressed disappointment that drug treatment was not offered sooner and stated that the drug court program in the Second Judicial District was ineffective for her daughter. Ms. Swope expressed support for treatment as a sentencing option and stated that inpatient treatment should occur before probation starts.

Ben Baur, deputy chief public defender, Law Offices of the Public Defender, expressed support for input from district attorneys, particularly assistant district attorneys.

Lisa Wisenfeld, policy coordinator, New Mexico Coalition Against Domestic Violence, stated that she supports the work of the CJRS and asked that the CJRS consider input from crime victims.

Margarita Sanchez stated that issues concerning civil rights and behavioral health need to be examined. In addition, she suggested that time frames related to arraignment should be addressed and that the criminal justice system needs to move toward promoting healing and rehabilitation.

**Adjournment**

There being no further business before the subcommittee, the fifth meeting of the CJRS of the CCJ adjourned at 4:32 p.m.